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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1732

CENTER SCHOOL DISTRICT No. 58, LEROY BARROWS, Superintendent, CHARLES CREWS, President and EVERT ASJES III, WILLIAM B. BRANDT, JOSEPH S. KENTON, J. K. KIDD, and DIANE SMALLEY, Members of the Board of Education of Center School District No. 58,

Petitioners,

vs.

JOHN GIERINGER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

CENTER SCHOOL DISTRICT No. 58, LEROY BARROWS, Superintendent, CHARLES CREWS, President and EVERT ASJES III, WILLIAM B. BRANDT, JOSEPH S. KENTON, J. K. KIDD, and DIANE SMALLEY, Members of the Board of Education of Center School District No. 58,

Petitioners,

vs.

JOHN GIERINGER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on April 20, 1973.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is set forth in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was rendered on April 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION RAISED

Should the First Amendment be construed so as to permit public statements concerning school business by a school teacher representative where, by previous written policy agreement, an obligation and duty exists between the Board of Education, the Administration, and the Teachers of the School District to meet jointly through representatives to engage in free and open dialogue and exchange views on matters of mutual concern in lieu of and/or prior to any public statement being made by either of the entities or a representative thereof.

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

Amendment to the United States Constitution, Article I states in part:

> "Congress shall make no law * * * abridging the freedom of speech * * *."

42 U.S.C. § 1981:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of per-

sons and property as is enjoyed by white persons, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Respondent (Gieringer), an untenured teacher, originally brought action pursuant to 42 U.S.C. §§ 1981 and 1983 seeking declaratory judgment, injunctive relief, and damages alleging that his constitutionally protected rights to free speech and due process of law had been violated when the Petitioner (Center School District No. 58) did not renew his annual teacher's contract.

Petitioners defended, inter alia, on the basis that Respondent's speech to a community teacher's association violated a previous written policy agreement between Teachers, Administration and Board of Education to act through a committee, known as TAB. That committee, of which Respondent was an active participating teacher representative, was to meet jointly to engage in free and open dialogue and exchange views and facts concerning such subjects of mutual concern as those involved in Respondent's public pronouncement.

The case was tried to the Court resulting in judgment for the Petitioners.

The Court of Appeals reversed the judgment of the District Court on First Amendment grounds and remanded the case for the entry of judgment reinstating Respondent, awarding him loss of back pay, subject to mitigation by Respondent's earnings since his "dismissal" and without any award for punitive damages.[1]

Motion for rehearing was duly filed and by the Court of Appeals, denied.[2]

REASONS FOR GRANTING THE WRIT

This case merits review by this Court on certiorari because under the facts of this case, the decision of the Court of Appeals conflicts with this Court's decision in *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and further conflicts with another Court of Appeals on the same matter in *Simard* v. *Board of Education of the Town of Groton,* 473 F.2d 988 (C.A. 2nd Cir. 1973).

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1. Appendix B—Opinion of the United States Court of Appeals.

2. Appendix C—Denial of Motion for Rehearing.

ARGUMENT

Petitioners Board of Education pursuant to Missouri statutory authority, and upon recommendation of the Superintendent of Schools did not renew a one-year contract of the Respondent, a non-tenured teacher. A full trial in District Court resulted in judgment for Petitioners. As opposed to Respondent's claim that a talk that he made to a Community Teachers' Association meeting was protected under the First Amendment, the District Court ruled "The statements were irresponsible and obviously made to create consternation and dissension. The constitutional guaranty of free speech does not apply to statements such as these, and the Court finds this point against the plaintiff."[3]

The Court of Appeals' Opinion Conflicts with This Court's Decision in Application of Pickering v. Board of Education

The only case cited and relied upon by the Court of Appeals in delineating the facts of this case is *Pickering* v. *Board of Education.*[4] In *Pickering,* a public school teacher wrote a letter to the editor of a local newspaper criticizing the way in which the Board of Education and the Superintendent of Schools had handled certain matters. This Court held at 391 U.S. 569-70 that the statements are in no way directed toward any person with whom appellant (Pickering) would normally be in contact in the course of his daily work as a teacher. Thus no ques-

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3. Appendix D—Unreported Memorandum and Judgment of District Court.

4. *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

tion of maintaining either discipline by immediate superiors or harmony among coworkers was presented.

To the contrary, the Respondent's speech was made at a Community Teachers Association meeting and, as the district court held,[5] "this report created a furor * * *." The next meeting of the committee was explosive and stormy, but the Respondent appeared to be delighted that his report had caused such controversy and dissension and had upset every person on the TAB committee except himself.

In *Pickering*, this Court held at 391 U.S. 572 "accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them," to which this Court footnoted that there was likewise no occasion furnished by Pickering for consideration of the extent to which teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public. Mr. Justice White in his dissent commented in that regard at 391 U.S. 582 that the Court did not elaborate upon its suggestion that there may be situations in which, with reference to certain areas of public comment, a teacher may have special obligations to his superiors. Further, that this Court's opinion does not foreclose the possibility that under the First Amendment a school system may have an enforceable rule, applicable to teachers, that public statements about school business must first be submitted to the authorities to check for accuracy.

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5. Appendix D—Unreported Memorandum and Judgment of District Court.

Here, in *Gieringer*, there existed an even stronger responsibility and obligation on Respondent's part to first submit his information to a joint meeting of TAB committee before publishing the same. The Teachers, Administration and Board of Education entered a joint policy agreement on July 1, 1969,[6] respecting good faith relationships and effective communications between these entities and required them to meet jointly to engage in free and open dialogue and exchange views on such matters as were the subject of Respondent's speech of October 14, 1969, to the Center Teachers Association. Gieringer was one of two teacher-representatives on that TAB committee. The response of the Petitioners' Superintendent of Schools, after the October 14th speech, was his letter of October 20, 1969,[7] to Respondent that his speech was irresponsible, unethical and unprofessional and further, that his conduct did little to confirm the good faith and common concern concepts of the Teachers, Administration, Board Agreement.

These facts belie the conclusion reached by the Court of Appeals in its finding that none of the indicia recounted in *Pickering* would take such public expression out of the sphere of protected activity, since Respondent's speech was not protected within the constitutional standards delineated in *Pickering* by this Court.

The First Amendment gives a teacher the right to speak his mind; but it does not give him the right to disrupt a school or to sabotage its programs.[8]

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6. Appendix E—Policy Agreement.

7. Appendix F—Superintendent's Letter.

8. *Tinker* v. *DesMoines School District*, 393 U.S. 503, 507, 89 S.Ct. 733, 21 L.Ed.2d 731, et seq. (1969); *Glover* v. *Daniel*, 319 F. Supp. 1070, 1075 (D.C. N.D. Georgia-Newman Division 1969).

The Court of Appeals' Decision Conflicts with a Decision of Another Court of Appeals on the Same Matter

The Second Circuit Court of Appeals decided *Simard* v. *Board of Education of the Town of Groton.*[9] Therein, Simard, a teacher, as in *Gieringer,* was denied tenure by the Board of Education's decision not to renew his one-year contract. Simard claimed the denial was founded on his teacher associated activities in contract negotiations with the Board of Education. Simard in relying on *Pickering* claimed at 966 that the defendant (School Board) had failed to make a showing under *Pickering* because the altercation between him and the school principal occurred in the privacy of the high school office. The Second Circuit Court of Appeals ruled this argument without merit and held that Simard's reliance on *Pickering* was misplaced. That Court found that, in *Pickering* the teacher's speech was in no way directed towards any person with whom he would normally be in contact in the course of his daily work. Gieringer's remarks were made to his fellow teachers at a Community Teachers' Association meeting. Therefore, by contrast, Simard's remarks (as under the facts in *Gieringer*), manifestly threatened significant working relationships vital to the administration of the school. The Court added that no evidence on the record is needed to prove that truism. Especially is this true in view of the previously adopted TAB Policy Agreement to which Gieringer, as a teacher-representative to that committee, was a privy party.

Thus, the Eighth Circuit Court of Appeals in *Gieringer* has taken a conflicting view of *Pickering* to that of the Second Circuit Court of Appeals in *Simard* on the same matter.

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9. *Simard* v. *Board of Education of the Town of Groton,* 473 F.2d 988 (Jan. 1973).

Viewed in the Light of Gieringer's Conduct and Attitude in Prior Years, His Speech Was Not Protected under the First Amendment

The Court below stated that the Respondent, who had been hired previously on successive one-year contracts, had, for his last annual contract, been transferred to another school in the District and concluded that this eliminated earlier frictions and *cleared the air.*

The Superintendent of Schools recommended non-reemployment of Respondent twice, once in 1969 and again in 1970, both of which recommendations were premised upon Respondent's abuse of contractual privileges, inconsideration of his co-workers, failure to cooperate with his administrators and supervisors, and making irresponsible statements calculated to demean others. The Superintendent was concerned as to Respondent's speech of October 14, 1969, only as it represented a continuation of the complaints about Respondent cited in the non-reemployment recommendation in 1969.

Thus, the Court below refused to consider the actions of Respondent prior to October 14, 1969, which contravenes rulings by other federal courts including *Calvin* v. *Rupp*[10] which held at page 362 that although it is true that even as of April 1st the school board would not have rescinded the offer of re-employment but for the situation which became known to them subsequent to March 11, nevertheless the members of the board (of education) could not reasonably be expected to completely divorce from their minds the plaintiff's known deficiencies when reappraising the offer of reappointment.

The limited view of the Court below also contravenes a prior determination of the 8th Circuit Court of Appeals

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10. *Calvin* v. *Rupp*, 334 F.Supp. 358, Eastern District, Missouri, Northern Division (Oct. 1971).

in *Freeman* v. *The Gould Special School District of Lincoln County, Arkansas,*[11] where at 1161 the Court ruled that there must be some degree of harmonious cooperation in school administration to insure an efficient use of public funds and a reasonably satisfactory school program. School boards, it was held, are representatives of the people and should have a wide latitude and discretion in the operation of the school district, including employment and rehiring practices.

Other cases supporting the principle of law that evidence of prior acts and characteristics showing gross inefficiency is competent to prove a present existing state thereof are noted.[12]

Thus, the Eighth Circuit Court of Appeals in Gieringer has taken a conflicting view to a prior decision of its own as well as a District Court's decision on the same matter.

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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11. *Freeman* v. *The Gould Special School District of Lincoln County, Arkansas,* 405 F.2d 1153 (C.A. 8th Cir. 1969).

12. *Powell* v. *Young,* 74 N.E.2d 261 (Ohio, 1947); *Redcay, Prosecutor* v. *State Board of Education,* 33 A.2d 120 (N.J. 1943); *State* v. *Peterson,* 294 N.W. 203 (Minn. 1940); *Hebert* v. *Lafayette Parish School Board,* (dissent) 146 So.2d 848 (La. 1962).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1535

John Gieringer,
Appellant,
The National Education Association, and Center Community Teachers Association,

vs.

Center School District No. 58, et al.,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

On Consideration of the motion of appellees for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 25, 1973

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1535

JOHN GIERINGER,
Appellant,

v.

CENTER SCHOOL DISTRICT No. 58, LEROY BARROWS, Superintendent, CHARLES CREWS, President and EVERT ASJES III, WILLIAM B. BRANDT, JOSEPH S. KENTON, J. K. KIDD, and DIANE SMALLY, Members of the Board of Education of Center School District No. 58
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: February 15, 1973

Filed: April 20, 1973.

Before LAY and BRIGHT, Circuit Judges, and NICHOL, District Judge.*

BRIGHT, Circuit Judge.

John Gieringer, in this civil rights action under 42 U.S.C. § 1983, seeks reinstatement to his teaching position in the appellee-school district and compensatory and punitive damages against members of the appellee-school board in their official and private capacities. The district court denied any relief, finding that Gieringer had not

*Sitting by designation.

been dismissed for a constitutionally impermissible reason nor, since he was nontenured, denied procedural due process.[1]

On this appeal, Gieringer asserts that he was dismissed for the exercise of his right of free speech and that the findings of the trial court in support of its conclusion to the contrary were clearly erroneous. He further argues that the failure to provide him with notice of cause and a hearing on his dismissal denied him due process and equal protection guaranteed by the Fourteenth Amendment. Finally, he contends that the court erred in admitting a letter and certain testimony which were hearsay. We reverse the judgment, disposing of this case on First Amendment grounds.

The school board employed Gieringer for the 1969-1970 school year as an elementary physical education teacher assigned to classes in two schools in the district. During the 10 years prior to this assignment, Gieringer had served as a guidance counselor in the same school district. Over the latter portion of this 10-year period, friction had developed between Gieringer and his superiors as a result of several incidents. The school superintendent concluded from these incidents that Gieringer's attitude toward his superiors and fellow employees was insubordinate, rude, and abrasive. For these reasons, in the spring of 1969, the superintendent recommended that Gieringer's contract not be renewed. The school board rejected the recommendation but, as we have noted, transferred Gieringer to a different position at other schools in the district.

During the next school year, Gieringer appears to have gotten along well professionally with his superiors, receiv-

1. The district court opinion has not been reported.

ing satisfactory or better ratings from the principals at both new schools. The sole exception to this apparent rapport arose out of an impromptu report delivered by Gieringer at a meeting of the Center Community Teachers Association in October, 1969. The subject of this report related to the school district's financial ability to raise teachers' salaries.

The district court related the following background to this incident:

> The "out-of-class speech" contention arises out of a report plaintiff made at a meeting of the Center Community Teachers Association. The background of the incident is that a tract of federally owned land is located in the School District. Under Section 521 of Title 40, U.S.C.A., the agency occupying these premises was obliged to pay an amount equal to the local real estate taxes to the local authority. This Act expired in 1968. G.S.A., the Government agency, had withheld payments, however, for the years 1966-68, inclusive, on the ground that the assessed valuation was too high. The county brought suit to collect for these years. The law providing for such payments was not reenacted upon its expiration, and, although bills were introduced for that purpose, the School Board was informed throughout 1969 by the Congressman representing the district that passage appeared very doubtful.
>
> Meanwhile, the teachers were seeking higher salaries for the 1969-70 school year. The Board submitted a larger tax levy to the voters to increase salaries, but it was defeated. In the fall of 1969 the County Counselor's office announced a settlement of the suit with G.S.A., which would result in a lump sum payment to the Board for the past three years of

payments which had been withheld. The teachers immediately asked for a salary increase, and the Board refused on the grounds that this was a "one-shot" payment, and there would be no way to finance the increased salaries in the following years.

The plaintiff was delegated by an officer of the C.C.T.A. to investigate this contention of the Board and report to the Association.

The basis for Gieringer's report to the Teachers Association lay in his conversations with the county attorney regarding the settlement agreement. Gieringer's impression was that even if the necessary enabling legislation failed, an alternative source of funds might be found. The essence of the report, as preserved in the Association's minutes, was that "John Gerringer [sic] reported that due to a court case over disputed property that a substantial amount of money should come into the district this year and in the next few years." Based on Gieringer's report, the Teachers Association resolved to study and investigate the matter of teachers' salaries further.

The school superintendent, upon receiving word of Gieringer's report from a teacher who had attended the meeting, concluded that the report had been deliberately designed to undermine the credibility of the school administration in the eyes of the teachers. The incident was considered evidence that the history of difficulties between Gieringer and the administration would continue. The superintendent, therefore, in March, 1970, renewed his recommendation that Gieringer's contract not be renewed for the following school year. The school board this time voted unanimously to approve the superintendent's recommendation.

In support of this action, the appellees argue that Gieringer's dismissal rested upon the entire history of his inability to get along with his superiors rather than simply upon the report which he had made to the Teachers Association. The record serves to belie this argument. The school board's transfer of Gieringer in 1969 to different schools and a different position eliminated earlier frictions and cleared the air. Thereafter, the only criticism of Gieringer's performance as a teacher emanated from his report given to the Teachers Association. It is clear from the record that this report served as a catalyst and that without it no discharge would have occurred.[2]

Thus, the precise question before us narrows to whether the school board dismissed Gieringer for the exercise of his First Amendment right of free speech or, as the administration urges, because his report was in fact a deliberate misrepresentation or otherwise so insubordinate or provocative as to justify his dismissal. The district court deemed the report to be constitutionally unprotected:

> The plaintiff was not simply criticizing Board practices or policies, but was accusing them of deliberately withholding or misrepresenting important and material facts. Such a report would naturally cause serious dissension among the teachers, and similarly cause a lack of confidence in the Board by all taxpayers in the district. The facts, as represented by plaintiff, were completely untrue, as the most cursory investigation would show. The statements

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2. Even assuming Gieringer's report may have been only partially a factor in his dismissal, if that report was protected activity, then the dismissal was still constitutionally impermissible. *Cook County Teachers Union, Local 1600, AFT v. Byrd*, 456 F.2d 882, 888 (7th Cir.), *cert. denied*, 409 U.S. 848 (1972); *Fluker v. Alabama State Bd. of Educ.*, 441 F.2d 201, 210 (5th Cir. 1971).

were irresponsible and obviously made to create consternation and dissension. The constitutional guaranty of free speech does not apply to statements such as these, and the Court finds this point against the plaintiff.

The controlling law is to be found in the Supreme Court's decision in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). The teacher in *Pickering*, in a letter to a newspaper, publicly criticized the school board's allocation of funds between educational and athletic programs and the way in which the real reasons for seeking additional tax revenues had been glossed over by the board and superintendent. The board dismissed the teacher on the ground that his letter was deliberately false and misleading and therefore an unjustifiable attack upon the board and the school administration, disruptive of the operations of the school district. The dismissal was sustained by the state courts.

In reversing, the Supreme Court held (1) that a teacher retains the right as a citizen to comment on matters of public concern; (2) that to the degree such commentary is substantially accurate, it provides no grounds for dismissal absent a showing of disruption of the teacher's classroom duties or the regular operation of the school, and (3) that, even if the commentary is inaccurate, a showing of disuption is still required unless it can be proved that the statements in question were knowingly or recklessly made. The Court determined that Pickering's letter contained inaccuracies but that these were not knowing or reckless and that no disruptive effect had been shown.

Here, the settlement agreement was a matter of public concern. Nothing in the evidence suggests that Gieringer's report in any way interfered with his teaching. It does not appear to have jeopardized his relation-

ship with fellow teachers with whom he had to work closely. It did not result in disruption of the district's operations. While the report evidenced optimism that the agreement might provide enough money to support a salary increase for teachers, it was couched in possibilities. There is no evidence that Gieringer deliberately sought to misrepresent his conversations with the county attorney in order to embarrass the administration. Gieringer's inference, from the background circumstances reported to him, that the school board would continue to receive federal monies was at least as permissible as the pessimistic pronouncements by the administration that any amount received from the federal government would represent only a "one shot" payment.[3]

In short, none of the indicia recounted in *Pickering*, which would take expression out of the sphere of protected activity, appear in this case. We, therefore, conclude that Gieringer's report was protected within the constitutional standards delineated in *Pickering* and hold that Gieringer was dismissed for a constitutionally impermissible reason.

The judgment of the district court is reversed. The case is remanded for the entry of judgment reinstating Gieringer and awarding him loss of backpay, subject to mitigation by Gieringer's earnings since his dismissal and without any award for punitive damages. *Cooley* v. *Board of Educ.*, 453 F.2d 282, 287 (8th Cir. 1972); *Ramsey* v. *Hopkins*, 447 F.2d 128 (5th Cir. 1971).

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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3. Congress, in fact, did authorize continued in-lieu-of-tax payments for 1969 and 1970 pursuant to 40 U.S.C. § 523. The legislation, however, was repealed effective January 1, 1971. Pub. L. No. 91-466, § 2 (Oct. 17, 1970).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1972

No. 72-1535

John Gieringer,
Appellant,

The National Education Association, and
Center Community Teachers Association

vs.

Center School District No. 58,
et al.,
Appellees.

Appeal from the United States District Court for the
Western District of Missouri.

Petition for rehearing filed by appellees in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

May 23, 1973

APPENDIX D

Memorandum and Judgment

(Filed May 24, 1972)

The plaintiff, John Gieringer, is an individual formerly employed by defendant School District. The National Education Association, a non-profit corporation, and the Center Community Teachers Association, an unincorporated association, joined as plaintiffs in this suit. The defendants are Center School District No. 58 and the Superintendent and members of the Board of Education of that School District, each of whom is sued both individually and in his official capacity. The suit arises out of the refusal of the defendants to reemploy the plaintiff as a teacher for the school year 1970-1971. The plaintiffs alleged in the complaint that "The sole basis for defendants' non-reemployment of plaintiff was his teacher association activities and the purpose was to deny him the benefits of the new state teachers tenure law and to inhibit teacher associations in their lawful activities."

Plaintiffs pray for declaratory judgment declaring that the failure to reemploy the plaintiff Gieringer is a violation of his constitutional right to freedom of speech, assembly and association; that the failure to provide plaintiff Gieringer with written grounds for his non-reemployment and a due process hearing is a denial of his right to procedural due process; and that the actions of the defendants were arbitrary and capricious, in denial of substantive due process. Plaintiff further prays for a permanent injunction ordering defendants to reinstate plaintiff and grant him a new contract and a permanent injunction enjoining defendants from failing or refusing to reemploy teachers, or engaging in other retaliatory acts, because of

teacher associations activities. Plaintiff Gieringer further prays for actual and punitive damages and attorneys' fees.

This case involves the refusal of a school board to reemploy, for the ensuing school year, a non-tenured teacher who had been employed by that district for the previous eleven years. Under a change in the laws of Missouri, if the plaintiff had been reemployed for the 1970-71 school year, he would then have acquired tenure as of July 1, 1970.

The plaintiff Center Community Teachers Association is an unincorporated association of the teachers employed by the Center School District, which is a large metropolitan Kansas City school district.

The evidence in this case shows that the plaintiff teacher was employed for ten years in this school district as a student counselor. He became more and more active in teacher association activities during this period. During the last several years of this period he had a number of difficulties with his superiors and his fellow teachers. The evidence on this point was very clear, and without detailing all the separate incidents, it is plain that his actions on many occasions were insubordinate, rude, and most abrasive toward his superiors and fellow employees.

Some of his actions demonstrated either extremely bad judgment or a very exalted view of his own importance. For example, after plans were drawn and approved, and a contract let, for remodeling of a school building, he continued to insist that changes be made to enlarge his counseling quarters. These insistent requests were emphatically denied by the administration, but after the contractor had commenced work, the plaintiff ordered the contractor's employees off the job and stopped the work for a short time.

All of these activities brought numerous reprimands and criticism from his superiors. Many of his fellow teachers would not refer students to him who needed counseling, and his last principal, a very impressive witness, told the administration that he would resign if this plaintiff was assigned to his school for the next school year.

In view of this dismal record, the defendant Superintendent of Schools recommended to the School Board in the spring of 1969 (when all teachers' contracts come up for renewal under Missouri law) that the plaintiff not be reemployed. The Superintendent's reasons for this recommendation were that the plaintiff was inconsiderate of fellow workers; that he did not cooperate with the administration or his immediate supervisors; that he did not accept constructive criticism; that he made irresponsible statements to demean others; and that he was insubordinate.

Notwithstanding this recommendation, the board voted to reemploy the plaintiff, not as a counselor, but as an elementary physical education instructor.

Now comes the ironic part of the story. Shortly after this meeting of the School Board, at which plaintiff Gieringer was reemployed, the plaintiff Center Community Teachers Association instigated an investigation into the employment practices of the defendant School Board. At the specific request of this Association, the Professional Rights and Responsibilities Committee of the Missouri State Teachers Association, with staff assistance from the Professional Rights and Responsibilities Commission of the National Education Association, the third plaintiff in this case, sent a team into the defendant School District specifically "to look into the employment and *dismissal* procedures of the Center Board of Education."

On May 22, 1969 this inquiry team filed a written report. In this report the chief criticism of the Board of Education was that it did not follow the recommendations of the Superintendent as to employment or refusal of reemployment of teachers. The report specifically pointed out that "The recommendation that a counselor not be re-employed was overruled by the Board of Education," and then concluded with the recommendation that:

> "Reemployment of principals, teachers, and all other employees, or the lack of reemployment should be recommended by the Superintendent of Schools and upon his recommendation be approved by the Board of Education."

At the next meeting of the Board to consider reemployment of teachers, the same Superintendent made the same recommendation that the same teacher not be reemployed for the same reasons, and the members of the School Board followed that recommendation, as urged by the report of the N.E.A.'s Professional Rights and Responsibilities Commission.

Immediately thereafter the National Education Association, through local and national counsel, joined the teacher who was not reemployed in the filing of this lawsuit, not only demanding his reemployment over the opposition of his Superintendent, but demanding personal damages against each member of the School Board, who followed N.E.A.'s recommendation to the letter. It certainly must seem ironic to these non-paid School Board members who have had to employ their own counsel to defend themselves from personal liability, to learn that this suit against them is being financed (at least partially) by the National Education Association.

This Court believes that under these undisputed facts the participation of the National Education Association in this lawsuit as a plaintiff is immoral and reprehensible. The participation of the Center Community Teachers Association, which secured the inquiry team report and did not disavow its recommendations in any way, is absurd. And this is especially true in view of the prayer for large monetary damages against the Superintendent and individual members of the Board of Education.

Of course, none of the above considerations affect in any way the merits of the plaintiff Gieringer's claim. His first contention is that he was not reemployed for two constitutionally impermissible reasons, namely, participation in teacher association activities and "out of class" speech.

There is no evidence whatsoever that the activities of the plaintiff in teacher associations was discouraged or frowned upon in any way by the administration or the Board. On the contrary, the evidence disclosed that he was complimented for this work, and plaintiff admitted that he was allowed "20 to 30 days off" with full pay during his last two years employment to attend such meetings. The Court finds this contention against the plaintiff.

The "out-of-class speech" contention arises out of a report plaintiff made at a meeting of the Center Community Teachers Association. The background of the incident is that a tract of federally owned land is located in the School District. Under Section 521 of Title 40, U.S.C.A., the agency occupying these premises was obliged to pay an amount equal to the local real estate taxes to the local authority. This Act expired in 1968. G.S.A., the Government agency, had withheld payments, however, for the years 1966-68, inclusive, on the ground that the assessed valuation was too high. The county

brought suit to collect for these years. The law providing for such payments was not reenacted upon its expiration, and, although bills were introduced for that purpose, the School Board was informed throughout 1969 by the Congressman representing the district that passage appeared very doubtful.

Meanwhile, the teachers were seeking higher salaries for the 1969-70 school year. The Board submitted a larger tax levy to the voters to increase salaries, but it was defeated. In the fall of 1969 the County Counselor's office announced a settlement of the suit with G.S.A,. which would result in a lump sum payment to the Board for the past three years of payments which had been withheld. The teachers immediately asked for a salary increase, and the Board refused on the grounds that this was a "one-shot" payment, and there would be no way to finance the increased salaries in the following years.

The plaintiff was delegated by an officer of the C.C.T.A. to investigate this contention of the Board and report to the Association. The plaintiff spoke briefly with the attorney for the county and made a report to a full membership meeting of the Association. Undoubtedly, the plaintiff's report was to the effect that the Board could pay the raise because plaintiff had learned that this was not a "one-shot" settlement, but that similar federal funds would be available in ensuing years. (The attorney whom he had consulted denied having made any such statement.)

This report created a furor. If true, it meant that the administration and Board had misrepresented the facts to the voters in asking for an increased levy, and had misrepresented the facts to the teachers in denying their raise.

The T.A.B. committee then in existence consisted of representatives of the teachers, administrators and Board.

Plaintiff was a member of this committee. The next meeting of the committee was explosive and stormy, but the plaintiff appeared to be delighted that his report had caused such controversy and dissension and had upset every person on the T.A.B. committee except himself.

This is not the type of free speech and criticism cited in the cases relied upon by plaintiff. The plaintiff was not simply criticizing Board practices or policies, but was accusing them of deliberately withholding or misrepresenting important and material facts. Such a report would naturally cause serious dissension among the teachers, and similarly cause a lack of confidence in the Board by all taxpayers in the district. The facts, as represented by plaintiff, were completely untrue, as the most cursory investigation would show. The statements were irresponsible and obviously made to create consternation and dissension. The constitutional guaranty of free speech does not apply to statements such as these, and the Court finds this point against the plaintiff.

Plaintiff's remaining claims are that he was denied due process by being denied a hearing before the Board, and that the refusal to give reasons for his non-reemployment amounted to unconstitutional, arbitrary and capricious action by the Board.

The plaintiff was a non-tenured teacher under the laws of Missouri. This Court is aware of the cases which confer some benefits of tenure on non-tenured teachers. The Court of Appeals of this Circuit has refused to amend, by judicial decree, state laws pertaining to teacher employment. *Freeman* v. *Gould Special District*, 405 F. 2d 1153 (1969), *cert. den.* 396 U.S. 843. That case further held that unless required by state law, a non-tenured teacher is not entitled to a hearing on the reasons for his non-reemployment.

There were no unconstitutional impermissible reasons for plaintiff's non-reemployment. The non-renewal of employment was accomplished in strict compliance with Missouri law. There was no denial of due process in refusing to conduct a hearing on the reasons for this non-tenured plaintiff's non-reemployment. The action of the defendant Board in refusing to re-employ the plaintiff was not arbitrary or capricious in any way.

For the above reasons, it is hereby

ORDERED that judgment be, and is hereby, entered herein in favor of all the defendants and against all the plaintiffs. Costs taxed to plaintiffs.

/s/ Wm. R. Collinson
District Judge

APPENDIX E

Defendants' Exhibit 35

POLICY STATEMENT: TEACHER*ADMINISTRATOR* BOARD RELATIONSHIPS FOR CENTER SCHOOL DISTRICT #58

I. *Beliefs Which Unite Us.*

We believe that *Classroom Teachers, Administrators,* and *School Board Members* share as a common goal . . . providing the highest quality educational program for the children, youth, and adults of this school district

We believe that to achieve this goal, it is of utmost importance to establish and maintain effective relationships and communications between classroom teachers, administrators, and the school board.

We believe that to enhance the optimum development of the educational program in this school district it is essential that classroom teachers, administrators, and school board members fully and freely exchange facts, opinions, and proposals relative to the policies, the rules, and the regulations that govern and affect curriculum and instruction, working conditions, grievance procedures, and salaries . . . and that whenever practical this dialogue should be prior to the school board making decisions on said matters.

II. *Relationships and Communications.*

To facilitate good faith relationships and effective communications among *Classroom Teachers, Administrators,* and the *School Board,* . . . School Board members or their representatives, the superintendent or his representative, and the representatives of the local teachers' association with the largest number of teacher-certificated personnel of the school district shall meet jointly to engage in free and open dialogue and exchange views on matters of curriculum and instruction, working conditions, grievance procedures and salaries, plus any additional areas that may be agreed to be of mutual concern.

Any of the parties should be able to request a meeting of the parties and have the request honored as soon as practical, and not later than 10 days from the date of request . . . unless a later date is mutually agreed upon.

If the parties cannot reach agreement on a matter of mutual concern, a jointly appointed study committee and/or professional and educational channels should be used in an effort to arrive at a solution or an agreement.

III. *Amendments.*

Future mutual agreements that will modify this document or its meaning shall constitute an amendment to the agreement.

IV. *Duration.* July 1, 1969 to July 1, 1971

/s/ .....
Teachers' Representative

/s/ .....
Administrators' Representative

/s/ .....
Board Representative

APPENDIX F

Plaintiffs' Exhibit 11

(October 20, 1969)

Mr. John Gieringer
Boone Elementary School

Dear Mr. Gieringer:

It has come to my attention that certain remarks made in a recent C.C.T.A. meeting and attributed to you are generally misleading and without basis in fact.

The statements in question are relative to the recent G.S.A. settlement and whether or not this is a one-time settlement or a source of continuing income to this school district.

In view of the fact that the statements made by you were contrary to information previously provided by this office, and no attempt was made to check this discrepancy, it can only be concluded that:

1. Your motivation in reporting the alleged "new information" was irresponsible, unethical and unprofessional;

2. Your conduct in this matter does little to confirm the "good faith" and "common concern" concepts of the Teacher-Administrator-Board agreement.

While it is your prerogative to seek information from all sources available to you, it is also your professional responsibility to confirm the accuracy of that information prior to sharing it with colleagues in an open meeting.

You are hereby directed to cease and desist in this irresponsible, unethical and unprofessional conduct. Further acts of this nature will be viewed as insubordination.

Sincerely yours,

/s/ Leroy Barrows
Leroy Barrows
Superintendent of Schools

LB:sc

JUL 20 1973

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1732

CENTER SCHOOL DISTRICT No. 58, LEROY BARROWS, Superintendent, CHARLES CREWS, President and EVERT ASJES III, WILLIAM B. BRANDT, JOSEPH S. KENTON, J. K. KIDD, and DIANE SMALLEY, Members of the Board of Education of Center School District No. 58,

Petitioners,

vs.

JOHN GIERINGER,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION
On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

OPINIONS BELOW

Neither the opinion of the United States District Court for the Western District of Missouri nor the opinion of the Court of Appeals for the Eighth Circuit has yet been reported, but are included as Appendices D and B respectively.[1]

1. References to appendices of the Petition are designated (Appendix ....), or (Appendix .... at .....).

JURISDICTION

Judgment of the Court of Appeals for the Eighth Circuit was entered April 20, 1973. Petition for rehearing was denied May 23, 1973. Petition for Certiorari was timely filed, asserting jurisdiction under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

The "Question Raised" as phrased by petitioner (Petition, Page 2) is predicated on a completely erroneous allegation that the "previous written policy agreement" placed a duty on the teacher association, the board and the administration to meet and discuss matters of mutual concern "prior to any public statement being made by either of the entities or a representative thereof". A careful reading of the policy statement (Appendix E) clearly shows that no such requirement existed (see also footnote 3, Point I of Argument).

Respondent believes that the determinative issue is whether a school board's discharge of a teacher in retaliation for his making an oral report to a teachers association meeting, despite the fact that the report caused no disruption of school activities and was substantially correct, violates his First Amendment rights.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions and statutes are set forth in the Petition.

STATEMENT

This case involves the decision of Center School District (herein "District") to terminate the employment of John Gieringer, a physical education instructor. That decision was based on an impromptu report made by Mr. Gieringer to the General Assembly Meeting of the Center Community Teachers Association (herein "CTA").

To understand the controversy, a brief background is required. District receives its revenue from the real and personal property taxes assessed by Jackson County, Missouri. Part of that revenue consisted of payments "in lieu of taxes" by the United States government. From 1955 through 1965, under acts of Congress, the United States paid the county an amount equal to the taxes which would have been paid if the government-owned property had been privately owned. A dispute arose between the United States and the county over the amount due the county for 1966 through 1968. The county filed suit. The dispute was settled and the United States agreed to pay $643,850.00 to cover the "in lieu of tax" contributions for 1966 through 1968 (29-33).[2] The government also agreed that, if the "in lieu of tax" provision (40 U.S.C. § 523) was reenacted, the additional payments commencing in 1969 would be based on an agreed tax valuation of the government property of $4,500,000.00. The school administration reported to the teachers that the settlement was a "one shot" payment (19, 44, 152).

A committee of the CTA then directed Respondent to further investigate the significance of the settlement

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2. References to the appendix filed in the Court of Appeals are designated (.....).

agreement (53). Respondent did so and reported his findings to the committee and to CTA's president (56).

On October 14, 1969, CTA held its General Assembly Meeting (55). The chairman of Respondent's committee was scheduled to make a report but had to leave the meeting early (145-146). Before leaving, he asked Mr. Gieringer to report in his place (145-146). Gieringer spoke for one or two minutes. Although there is some conflict as to the details of what he said, the general tenor is undisputed (47, 56-57, 129). He stated that, in addition to the payments for 1966-68, "there should be or would likely be $170,000.00 in lieu of taxes for the 1969 year". The secretary of the association summarized the report in the association's minutes:

> "John Gerringer [sic] reported that due to a court case over disputed property that a substantial amount of money should come into the district this year and in the next few years." (47).

The Appellate Court found that the report did not result in any disruption of school or classroom activities (Appendix B at A8). The superintendent of schools, one of the defendants in the suit, admitted that he knew of no problems which arose as a result of the Gieringer report except that a number of teachers questioned whether more money was going to come in (174-175, 222). However, a heated discussion arose at a meeting of the Teacher Administration Board committee (herein "TAB"), when the assistant superintendent stated that the CTA had no right to investigate the question and that Gieringer had been lying (59, 148, 158).

Despite the fact that the two prinicpals under whom Gieringer was teaching had given him satisfactory or higher ratings in every department and despite the fact

that neither principal had ever given Mr. Gieringer an oral reprimand or a written statement of unsatisfactory performance, the school board refused to renew his contract. As recognized by the Court of Appeals, "it is clear from the record that this report [to the CTA] served as a catalyst and *that without it no discharge would have occurred.*" (Emphasis added) (Appendix B at A6).

The school district received both the lump sum payment for 1966-68 and a payment of approximately $170,000.00 in each of the years 1969 and 1970, as Gieringer had indicated.

Gieringer brought an action under 42 U.S.C. §§ 1981 and 1983 seeking declaratory judgment, injunctive relief, and damages for alleged violation of his First and Fourteenth Amendment rights. Jurisdiction of the District Court was based on 28 U.S.C. § 1343 (3) and (4). The District Court entered judgment for defendants (Appendix D).

On appeal, the Court of Appeals for the Eighth Circuit reversed, ordering reinstatement and awarding back pay (Appendix B).

ARGUMENT

I

The Court of Appeals Correctly Applied the Principles Established by Pickering v. Board of Education

The present case is clearly controlled by this court's decision in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). The Court of Appeals correctly held that the principles established in that case required Gieringer's reinstatement.

The parallel to *Pickering* is striking. Both cases involve statements on matters of public concern. Both statements were made outside the classroom. Neither statement interfered with the teacher's working relationships or his teaching performance. Neither involved any deliberate misrepresentation. Neither involved any failure to follow "narrowly drawn grievance procedures."[3]

Petitioner contends that the decision below conflicts with *Pickering*. The best response is the language of the Court of Appeals.

> "Nothing in the evidence suggests that Gieringer's report in any way interfered with his teaching. It does not appear to have jeopardized his relationship

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3. Petitioners argue that the TAB Policy Statement (Appendix E) is such a procedure. Even the most cursory examination of the document reveals that it is nothing of the sort. The Policy Statement contains many vague statements relating to the best ways to "enhance the optimum development of the educational program" and to "facilitate good faith relationships between" teachers and administration. Nothing in the document requires a teacher to submit any information to the TAB prior to communicating it to the teachers (62, 120). Furthermore the administration without consulting with TAB or CTA had already announced its version of the settlement agreement.

with fellow teachers with whom he had to work closely. It did not result in disruption of the district's operations. While the report evidenced optimism that the agreement might provide enough money to support a salary increase for teachers, it was couched in possibilities. There is no evidence that Gieringer deliberately sought to misrepresent his conversations with the county attorney in order to embarrass the administration. Gieringer's inference, from the background circumstances reported to him, that the school board would continue to receive federal monies was at least as permissible as the pessimistic pronouncements by the administration that any amount received from the federal government would represent only a 'one shot' payment.

In short, none of the indicia recounted in Pickering, which would take expression out of the sphere of protected activity, appear in this case." (Appendix B at A7-A8) (Emphasis added).

Ironically, Gieringer was discharged for an accurate prediction. The administration's statements that any amount from the government would represent only a "one shot" payment prove to be wrong. The District *did* receive approximately $170,000.00 in each of the two years following the Gieringer report. Whether Gieringer said that there "would likely be $170,000.00 in lieu of taxes for the 1969 year" or only that "a substantial amount of money should come into the district this year and in the next few years" is immaterial. In either event, his statement was substantially more accurate than the administration's statement that *no* additional money would be received.

II

The Decision Below Is Entirely Consistent With the Decision of the Court of Appeals for the Second Circuit in Simard v. Board of Education

There is no conflict between the decision of the court below and the decision of the Court of Appeals for the Second Circuit in *Simard* v. *Board of Education*, 473 F.2d 988 (2nd Cir. 1973). *Simard* dealt with a different problem and a different factual situation. The court in *Simard* found that the failure to renew Simard's contract was not connected in any way with his teacher union activities. *Id.* at 995-996. In sharp contrast, the Appellate Court in the present case found that Gieringer's report to the teacher association "served as a catalyst and that without it no discharge would have occurred." (Appendix B at A6).

The insubordinate conduct for which Mr. Simard was discharged was radically different from Mr. Gieringer's peaceful speech to his fellow teachers at a teacher association meeting. The principal of Simard's school encountered him in the school office at a time when Simard was scheduled to be teaching a class. Three times the principal asked Simard to return to the class but Simard refused. He told the principal that he had no intention of returning to the class until after he had a cup of coffee and checked his mail. He told the principal "to write him another letter". *Simard* v. *Board of Education*, *supra* at 996, n. 13. Thus, Simard directly refused to obey a lawful order to perform the job for which he was being paid.

The speech for which Gieringer was discharged was a teacher association activity. The Court of Appeals found that the speech concerned a matter of public interest, that no evidence indicated that it interfered with Gieringer's teaching activities, that it neither jeopardized his relation-

ship with his fellow teachers nor resulted in any disruption of the school district's operations, and that it represented an interpretation of the facts that "was at least as permissible as the pessimistic announcements by the [school] administration." (Appendix B at A8).

The present case and *Simard* simply do not deal with the same problem. The Second Circuit upheld Simard's discharge after finding that it was motivated solely by his blatant insubordination and not by his teacher association activities. The Eighth Circuit struck down Mr. Gieringer's discharge when it found that Gieringer had been discharged because of a speech made in a public teacher association meeting. There is no conflict.

III

This Court Should Not Review the Concurrent Findings of Fact of the Two Courts Below

This court has repeatedly stated that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error". *Berenyi* v. *Immigration Service*, 385 U.S. 630, 635 (1967); *Allen* v. *Trust Company*, 326 U.S. 630 (1946).

Petitioner's suggestion that the Court of Appeals ignored evidence of Mr. Gieringer's conduct in prior years is a thinly disguised request that this court review such a concurrent finding.

The Court of Appeals expressly ruled that Mr. Gieringer was discharged *because of his report to the CTA*. It did not ignore Mr. Gieringer's prior record. It considered that record yet found that the school district had been motivated by Gieringer's report—not his record. The court said:

> "In support of this action, the appellees argue that Gieringer's dismissal rested upon the entire history of his inability to get along with his superiors rather than simply upon the report which he had made to the Teachers Association. The record serves to belie this argument. The school board's transfer of Gieringer in 1969 to different schools and a different position eliminated earlier frictions and cleared the air. Thereafter, the only criticism of Gieringer's performance as a teacher emanated from his report given to the Teachers Association." (Appendix B at A6).

The District Court apparently agreed. That court held that Mr. Gieringer's speech was unprotected activity (Appendix D at A16). No such holding would have been necessary unless the trial court concluded that *the speech caused Gieringer's discharge.*

Petitioner gives no reasons for believing these findings to be false. There are no such reasons.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

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